BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2014-346-WS

IN RE: Application of Daufuskie Island Utility Company, Inc. for Approval of an Adjustment for Water and Sewer Rates, Terms, and Conditions	)	**RESPONSE IN OPPOSITION TO PETITION FOR RECONSIDERATION**

Haig Point Club and Community Association, Inc. ("HPCCA"), Melrose Property Owner's Association, Inc. ("MPOA"), and Bloody Point Property Owner's Association ("BPPOA") (together "POAs") hereby responds to the Petition filed by Daufuskie Island Utility Company, Inc. ("DIUC") on December 21st seeking reconsideration or rehearing of Commission Order No. 2015-846 (the "Order"). As set out herein, the Commission should deny the Petition for Reconsideration because the factual findings of the Commission are supported by substantial evidence and the Commission committed no error of law.

I. INTRODUCTION

The POAs support those arguments made by the South Carolina Office of Regulatory Staff ("ORS") in opposition to the Petition, and will not repeat those here. However, several specific points further demonstrate why reconsideration or rehearing is unwarranted. As set out herein, 1) substantial evidence in the record supports those adjustments approved by the Commission in the Order; 2) DIUC's contentions related to its Covenants are not properly before the Commission; and 3) The Commission's use of DIUC's previous rate case as a "starting

point" for its determinations in this case is not contrary to law.

II. ARGUMENT

A. The Order is Supported by Substantial Evidence and is Not Clearly Erroneous

The Commission's determinations in the Order are consistent with South Carolina and should not be reconsidered:

> The PSC is considered the "expert" designated by the legislature to make policy determinations regarding utility rates; thus, the role of a court reviewing such decisions is very limited. Therefore, the party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the substantial evidence in the record.

Kiawah Property Owners Group v. Public Service Commission of South Carolina, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Porter v. South Carolina Public Service Commission*, 333 S.C. 12, 23, 507 S.E.2d 318, 324 (1998). Under the substantial evidence standard a finding upon which reasonable people may differ will not be set aside. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 137, 276 S.E.2d 304, 307 (1981). Further, the weight and credibility assigned to evidence presented is a matter peculiarly within the province of the Commission. *South Carolina Cable TV v. Southern Bell and the Public Service Commission*, 308 S.C. 216, 417 S. E. 2d 586 (1992).

B. The Covenants and Attachment A to the Petition Are Not Properly Before the Commission

DIUC putatively supports its contention that "[t]he rates as approved will force DIUC into default" (Petition at p.1) by reference to the covenants contained in DUIC loan documents

for SunTrust Bank financing ("Covenants"), and through an attachment to the Petition entitled "Impact of Commission's Order Accepting ORS/POA Settlement" ("Attachment"). Neither the Covenants nor the Attachment were prefiled by any witness in this Docket as required by Commission Rule 103-845(C), nor were they introduced into evidence at the hearing in this matter. In addition, the Petition (at pp. 3-5) and Attachment A characterize the effect the Order will have on DIUC's compliance with the Covenants, offering opinions that were not offered via testimony during the hearing. As such, the POAs cannot test those opinions, (or the inputs and assumptions leading to those opinions) by cross examining a witness making them. The Commission's acceptance and consideration of the opinions in the Petition and Attachment A would substantially prejudice the POAs in violation of their due process rights. *See Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998).

Even if the Covenants were provided to the Commission in Docket No. 2012-397-WS (and the DMS does not indicate that the Covenants were part of that Docket), that fact alone would not allow the Commission to consider them in this Docket. DIUC did not seek to make those documents part of the record in this Docket by means of Commission Rule 103-847.

Similarly, DIUC cannot raise issues in a Petition for Reconsideration that were not raised during the proceeding. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App 1990); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). While Mr. Guastella made a bare contention at the hearing, referenced in the Petition, that the rates approved in the Settlement Agreement, the specific issues and characterizations of the Covenants, DIUC's operation under the Covenants, and SunTrust's putative actions pursuant to

the Covenants raised in the Petition and discussed in Attachment A were not raised during the hearing. As a result, the Commission cannot address these issues on reconsideration.

In sum, the Commission cannot consider that portion of the Petition characterizing the effect of the Order on the Covenants, or the entirety of Attachment A to the Petition.

C. The Commission's References to the Previous Rate Case Are Not Contrary to Law

DIUC maintains that it was error, based on *Utils. Servs. Of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011) ("*Utilities*") for the Commission to "rely on" Order No. 2012-515 in Docket No. 2011-229-WS (DIUC's most recent rate case) "for its reasoning in the current case" (Petition at p. 12) in considering ORS's adjustments to the management fees of Guastella Associates ("Management Fees"), as well as DIUC's rate case expenses. DIUC's application of *Utilities* is misplaced, as the Commission did not "rely on" Order 2012-515 in approving ORS's adjustments, but rather followed established South Carolina practice in using the rate increase approved by Order 2012-115 as a baseline for determination, and then "relying on" (or justifying) its decision with the evidence provided by ORS and the POAs

While *Utilities* does stand for the proposition that it is error to use a previous rate increase as *justification* for denying a rate increase, *Utilities*, 392 S.C. 115, 708 S.E.2d 765 (*emphasis added*), it also recognizes that "a previous rate increase may provide a baseline for the PSC to use in determining whether a utility has incurred additional expenses requiring additional revenue." *Id.* The Commission used the information from Docket No. 2011-329-C as a baseline for consideration of DIUC's proposal, but used the evidence in this Docket as justification for its

decisions in the Order.

In other words, a previous rate increase is typically a "starting point" in a new rate case. Accordingly, the only way for DIUC to attempt to justify an increase in expenses (or for the ORS, the POAs, or the Commission to attempt to rebut a proposed increase) is to "compar[e] the expense from the test year used in the previous rate case with those from the test year in this case…." *Heater of Seabrook, Inc. v. Public Service Comm'n of S.C.*, 324 S.C. 56, 61, 478 S.E.2d 826, 828 (1996). In other words, amounts for management fees and rate case expenses in Docket No. 2011-229-WS provide the "baseline" or standard against which to compare DIUC's proposed expenses for those items in this Docket, because those fees and expenses previously were deemed reasonable by the Commission.1

However, DIUC cannot *satisfy* its burden of proof simply by comparing the current test year expenses with those in the previous rate case. *Utilities*, 392 S.C. 109, 708 S.E.2d 762. Instead, when the reasonableness of proposed fees and expenses are challenged (as was the case here), "the burden remains on the utility [DIUC] to demonstrate the reasonableness of its costs." *Id.* And as the Order makes clear (pp. 26-27), the Commission determined, based on substantial evidence in the record (including the testimony of POA witnesses), that DIUC did not satisfy that burden to demonstrate that those challenged costs were reasonable. In sum, the Commission followed the procedure contemplated by South Carolina law, and *Utilities* in particular, in making adjustments to DIUC's proposed fees and expenses, and there is no basis to grant

[1] Contrary to the contention of DIUC, the management fee approved by Order No. 2012-515 in Docket No. 2011-229-WS was a "Commission-approved" fee. Order 2012-515 approved a Settlement Agreement specifically "based on the test year revenues after adjustments proposed by ORS in its pre-filed testimony and exhibits." Settlement Agreement, Page 2. As such, the management fee (as well as all other ORS adjustments) were approved by the Commission.

reconsideration of the Order.

III. Conclusion

For the foregoing reasons, and those set out in the response of ORS, the Commission's determinations in the Order are fully supported by the evidence and its conclusions are not erroneous as a matter of law. The POAs respectfully request that the Commission deny DIUC's Petition.

Respectfully submitted,

ADAMS AND REESE, LLP

BY: s/ John J. Pringle, Jr.
John J. Pringle, Jr.
1501 Main Street, 5th Floor
Columbia, SC 29201
Telephone: (803) 254-4190
Facsimile: (803) 799-8479
jack.pringle@arlaw.com

Attorneys for Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc. and Bloody Point Property Owner's Association

January 8, 2016
Columbia, South Carolina

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THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2014-346-WS

RE:

Application of Daufuskie Island Utility Company, Inc. for Approval of an Adjustment for Water and Sewer Rates, Terms, and Conditions	)))))	**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served the Response in Opposition to Petition for Reconsideration of Haig Point Club and Community Association, Inc. ("HPCCA"), Melrose Property Owner's Association, Inc. ("MPOA"), and Bloody Point Property Owner's Association ("BPPOA") via first-class mail service and electronic mail service as follows:

Shannon Bowyer Hudson, Esquire
Andrew M. Bateman, Esquire
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia SC 29201
shudson@regstaff.sc.gov
abateman@regstaff.sc.gov

G. Trenholm Walker, Esquire
Thomas P. Gressette, Esquire
Pratt-Thomas Walker, PA
PO Drawer 22247
Charleston SC 29413
gtw@p-tw.com
tpg@p-tw.com

s/John J. Pringle, Jr.
John J. Pringle, Jr.

January 8, 2016
Columbia, South Carolina